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by

A Committee of the
HALDANE SOCIETY

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A Programme for the Next Three Years

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A PROGRAMME OF LAW REFORM FOR THE NEXT THREE YEARS

FROM 1844 TO 1862 the Society for promoting the amendment of the law met weekly from November to July and published a journal. From that time until twenty years ago there was nobody whose primary object was the amendment of law as a whole. Some twenty years ago, however, the Haldane Society, composed of Labour Party barristers and solicitors, was founded and it has, during its twenty years of existence, considered many of the fields of law reform. It has published reports, drafted bills and urged the need for law reform, both within the Party and without, but until the coming of the Labour Government in 1945 there was very little hope that anything substantial would be done.

The Labour Government's preoccupation during its first two or three years with the transition from war to peace, the reconversion of industry, demobilisation and the problem of increased production made it unlikely that it would have much time for carrying through measures of law reform which do not involve strong electoral feelings. These conditions will, however, change and in November, 1946, the Haldane Society adopted the following twelve-point programme of measures which can be carried through within the next three years.

Reforms requiring Legislation

(i) The position of the Crown as a litigant.

(ii) The abolition of the doctrine of common employment.

(iii) Certain short amendments of the law of landlord and tenant.

(iv) Certain questions specially affecting the position of married women.

(v) A Criminal Justice Bill (including the abolition of the death penalty).

(vi) The qualification and payment of juries.

(i) The simplification of divorce procedure.

(ii) The appointment of justices of the peace.

(iii) Registration of title to land.

(iv) Consolidation of statutes and codification of the law.

(v) The management of the courts and their practice and procedure.

(vi) The implementation of the Report of the Rushcliffe Committee on legal aid.

It is significant that at the time of writing the Crown Proceedings Bill, which carries out the Society's recommendations on point (i), has already been introduced into Parliament. This is a Bill which was first drafted by a Government Committee in 1927, and despite the professed preoccupation of Conservatives with freedom, they consistently refused to pass it into law before the war. Mediæval privileges which had been given to the King personally were attached to the Crown, which, in fact, meant the Government. For instance, the maxim that "the King can do no wrong" was held to prevent an action for damages against the Post Office when a negligent Post Office van driver injured an innocent pedestrian. The Crown could not be sued in contract except with its own consent and it has had arbitrary powers of imprisonment and distress. These privileges are being swept away by the Labour Government and the ordinary citizen will be able to sue the Crown on almost the same terms as he can sue any other body. The Bill will be law by the time this pamphlet is issued, and it is unnecessary to deal further with it. The Haldane Society takes some credit for the introduction of this Bill, as it re-drafted the 1927 Bill to bring it up-to-date and it took a prominent part in awakening public opinion and showing the Government that the Bill was really called for.

The selection of the following reforms as those which require immediate action does not mean that the Society is satisfied with other branches of law. On the contrary, no one more clearly than a Socialist lawyer recognises that every branch of law needs a radical overhaul to simplify it and make it clear

and intelligible, to reduce the cost of litigation, bring it within the range of ordinary people and speed it up. So wide is the field of law reform that it is easy to select so much needing reform that nothing gets done. There is in England no Ministry of Justice or Government department whose duty it is to review the development of law as a whole and promote amending bills when necessary or desirable. Government departments such as the Ministry of Health and Ministry of Labour promote amending Bills when they can for the fields of law for which they are responsible; for instance the Ministry of Health drafted the Poor Law Act 1930. But there are vast acres of law for which no department feels any particular responsibility. This was the case with the Crown Proceedings Bill, although the Lord Chancellor felt some responsibility for this, since it was a Committee appointed by him which had produced the first draft. About 1934 the Lord Chancellor set up a Law Reform Committee to consider the reform of specific rules of law when referred to it. This Committee produced a number of admirable reports, most of which have been carried into law, although one (Cmd. 5,449), issued in 1937 on the Statute of Frauds and the doctrine of consideration, it is important to note, still remains unenacted.[1] This Committee's reports only dealt with a few problems. There is still the need for a prominent body or commission to watch, advise, codify and overhaul the whole of English law.

Recognising that the Government has a very full programme, the Haldane Society has limited its immediate objectives to the following eleven—five of which primarily require a new Act of Parliament and six of which can be dealt with mainly by administrative action. It believes that these measures would be popular, relatively non-partisan and generally agreed and that they could easily be fitted into the Government's programme. These proposals are therefore submitted to the Government, the Party and the nation in the belief that by discussion and the expression of opinion the need for these reforms will be seen and that they will become effective within this Parliament's life. A number of them, moreover, have the merit that they will of themselves lead to further

[1] In order to introduce further clarity into English law, this report should as soon as possible be passed into law.

reform. We therefore come now to discuss the Society's plans in detail.

Common Employment

The first is the abolition of the doctrine of common employment. This remarkable rule of law states that when an employee accepts employment, he is considered voluntarily to accept the risk of injury from a fellow employee, and that since he has consented to this injury, he can bring no action against that employee's employer if he is injured by the negligence of the fellow employee. The rule dates from the early nineteenth century, when the dominant social framework was both consciously and unconsciously designed to protect the privileges of the employing class. The courts unconsciously followed the bias given by authority and produced this fiction. In recent years, however, the trend of dominant opinion has been more in favour of the workman; the courts have followed suit, but whilst not able to abolish this law, have only been able to narrow and restrict its scope. An example may make clearer when the rule applies and when it does not. If a tram belonging to a transport authority is driven negligently and runs into another tram, injuring the conductor of this tram, the conductor has no right of action against the common employer of himself and the tram-driver, because he is assumed to have consented to this injury and to have known of the risk that he might incur. The passengers in the tram can, of course, bring an action for damages for negligence. If the tram, however, being negligently driven were to run into a lorry delivering oil for the authority's buses, although there would be a common employer, there would be no common employment. There is little sense in the distinctions which have been drawn to try and restrict the operation of this rule and it is often difficult to say in practice whether it does or does not apply. The courts have for many years urged Parliament to abolish it and the Committee on alternative remedies (1946) recommended that it should disappear. The Haldane Society place the abolition of common employment among their priorities, in order that a worker may no longer lose his right to damages because of a legal fiction and a consent which he has never given or ever known about.

The next necessary reform is in connection with the law of *landlord and tenant.* We need not concern ourselves here with the Rent Restrictions Acts, since they profess to be emergency legislation, although they have been in force since 1914. It may, however, be noted in passing that these Acts are quite ridiculously complicated; that there are two different systems of rent control and that Lord Ridley's Committee which reported in 1945 (Cmd. 6,621) recommended a number of amendments and the passing of a new rent Act with one comprehensive code for all houses affected by it. This report has not yet been passed into law and it is greatly to be hoped that the Ministry of Health will find time within the next year or so to do this. Most of it is not likely to be highly controversial.

The reforms we refer to are concerned with the law of landlord and tenant which has been in force for many years. Most of it is the creation of common law, i.e. has become law only by judges' decisions. In the first place, we suggest that in all tenancy agreements there should be implied an agreement by the landlord that he had a good right to create the tenancy for the period and upon the conditions upon which it was let and for quiet enjoyment against the whole world. There is at present no such implied covenant and its absence can work great hardship. For instance, a borrower of money under a mortgage may lease the property, and without the lender's consent the lease may be void; the tenant may not know of the mortgage, but the lender will be able to eject the tenant. If a tenant unknowingly takes an underlease for a period longer than his landlord's lease and is then evicted by the head landlord, he has no claim for compensation even against his own landlord. In a case in 1913 a tenant rented half a house and the landlord never disclosed that he was forbidden to let the property for a trade or business. The head landlord got the sub-tenant's business stopped by order of the court and the sub-tenant had no remedy even against his own landlord. Even if a tenant makes enquiries from his landlord he has no remedy if the reply is misleading.

The law of repair of properties by landlords is in a most unsatisfactory state, and unless the property is within the Housing Act, 1936 (see below), there is no agreement by the landlord that the place is fit for habitation or use. The facts of

a case in 1940 show this very clearly. A tenant took a flat and told the landlord she would not need the gas-fire in one of the bedrooms. The landlord said he would remove it. The fire was disconnected and removed, but no tap was left in the pipe so as to prevent gas escaping into the room. The tenant married, had the gas turned on and slept in the room the first night of marriage. Her husband was killed by gas poisoning, while she recovered after a time but was unable to get any damages.

The question of repairs is also most unsatisfactory. The landlord is nnder no obligation to do any repairs unless he expressly agrees to do so. Even when he charges the 40 per cent. increase under the Rent Restriction Acts, which includes an allowance for repairs, he cannot be compelled to do them, although a enant may be able to get his rent reduced if they are not done. Uuless the landlord expressly agrees to do repairs, he can in law so far as his tenant is concerned let the property fall down if he chooses, and a tenant for his own sake is frequently compelled to do the repairs. The powers given by the Public Health and Housing Acts to local authorities to compel landlords to do repairs are not sufficient from a tenant's point of view. He needs a direct remedy against his landlord.

Under the Housing Act, 1936, there is an exception from the general rule about repairs for properties let at not more than £40 per year in the County of London, or £26 per year elsewhere, but this Act has been whittled down by decisions of the courts. Rent is held to include rates, and most rents on this basis exceed 10*s.* a week or 15*s.* 4½*d.* in London. Houses within the Act must be kept in repair by landlords, but this law only applies to an action by the tenant; for instance, if a member of the tenant's family is injured by lack of repair, he can bring no action against the landlord. The Act does not apply to a common staircase, because that is not let to the tenant, but only to the flat or property actually included in the tenancy agreement. If a tenant does not give notice of necessary repairs which he knows about, then he is not able to recover damages. The law should be amended so that a landlord is liable to do all structural and exterior repairs, unless he specifically provides to the contrary, and to keep premises throughout the tenancy in all respects fit for human occupation. Moreover, the law should be altered to

provide that a landlord who is liable for repairs can be sued by anyone to whom the lack of repair causes injury.

Another desirable reform would be to stop a landlord deliberately lowering the value of his lease. A landlord may allow a tenant only to carry on one particular type of business, but there is nothing at present to prevent the landlord permitting his shop next door to be let to a competitor in exactly the same business.

Tenants commonly agree to pay rates, but they do not always realise that the use of words such as "outgoings" or "charges" may mean that they have to pay heavily for paving the street or making the drains comply with some order of the local authority. The law should be changed so that they are not liable for such charges unless they expressly agree to pay them.

Another anomalous rule is that a tenant who has agreed to do repairs must rebuild the property if it is destroyed by fire, (war damage is an exception). Although the landlord may have received insurance moneys, rent continues despite damage by fire, unless there is a specific provision suspending rent. These rules should be changed so that a tenant does not accept these liabilities unwittingly.

A very large number of tenancy agreements are drawn up by landlords themselves, or by estate agents. Tenants frequently have no legal advice when they sign them, or if they have, the bargaining power is likely to be with the landlord and the tenant has to give way. That is why these reforms should either impose obligations on landlords which they cannot escape or make them a landlord's liability unless the agreement clearly provides to the contrary.[1]

Married Women

Magistrates have power to make separation or maintenance orders for a wife on such grounds as adultery, desertion, persistent cruelty and neglect to maintain. A husband can get an order for adultery. The orders do not, however, terminate the marriage. The Haldane Society is doubtful if magistrates' courts are the proper courts in which to decide fundamental

[1] We are grateful to the article by B. Plummer in the *Modern Law Review* for April, 1946, on this subject.

questions in disputes between husbands and wives. This, however, is a controversial matter. Pending proper consideration of it, we suggest that the maximum amount magistrates can award to a wife in maintenance and separation cases should be increased from £2 to £10 per week, but a wife should not be entitled to more than one-third of the joint incomes of herself and her husband, less her own income. The increase for a child should be from 10*s.* per week to £1 per week. The present limits were fixed before 1914, the cost of living has gone up immensely since that date, and they are now quite inadequate. All sections of the population are now using magistrates' courts in matrimonial disputes, often as a prelude to divorce, and therefore the income limits should be raised.

Another reform which is needed is to enable magistrates to order a husband's employer to pay a part of his wages direct to the court. At first sight this might be resented by trade unionists, but it is really in the interests of the husband himself as much as that of the wife. The pitiful procession of husbands who appear in courts for arrears due under maintenance orders, losing a day's work in consequence, will convince anyone who sees them of the need for this change. Large arrears often accumulate because a man has been slack, but not through any real desire to default. In the end, however, it may appear to be wilful default and prison may result, losing the husband his work and depriving the wife of any chance, for the time being, of maintenance. This proposal would reduce the number of husbands sent to prison and assist, by regularity of payment, their wives and children who are dependent on them.

Under the heading of separation orders, the Society suggests that to equalise the law rather more between men and women husbands should be able to obtain such orders on the ground of persistent cruelty as well as wives. Moreover, the element of "persistence" might well be removed from the offence.

A rather novel proposal made by the Society is that either husband or wife should be able to obtain a copy of the other party's income tax returns for the preceding three years, on application to the local Inspector of Taxes on payment of 2*s.* 6*d.* This proposal is put forward to establish equality of rights in the home by enabling both parties to the marriage to know all about each other's property and income. It is not

likely that this right would often be invoked in any harmonious marriage, but the law would set a standard and encourage husbands and wives to be more frank with each other. It is still common for women not to know what their husband's wages are.

Criminal Justice Bill

The Society is in favour of the enactment of the Criminal Justice Bill, 1938, with certain amendments. It may be useful to summarise some of the provisions of this Bill. A woman probation officer was to be provided for every area as well as a male officer and a case committee formed in every petty sessional division to review the probation officer's work in individual cases. Under the present law, when an offender is put on probation, no conviction is recorded, but the Bill would amend this so that the offender would be convicted, but this provision would be disregarded for certain purposes, e.g. where disabilities are imposed on convicted persons. The minimum period for probation was to be increased from six months to one year. Power was to be given to a court to order a person to submit to treatment for his mental condition, as a condition of probation. This treatment was to be provided for an offender who was non-certifiable and might be given to him as a non-resident patient or as a resident patient.

An important provision was for the setting up of remand centres by the Home Secretary for persons between fourteen and twenty-three who had been remanded or sent for trial without bail. The use of a centre was to be compulsory when it became available, and facilities for observation would have had to be provided in a centre to advise courts on how best to deal with offenders. State remand homes would be set up, in addition to remand homes provided by local authorities, for persons between fourteen and seventeen too unruly or depraved to be sent to the local remand home.

The Bill proposed to set up compulsory attendance centres administered by the State for persons between seventeen and twenty-one and juvenile centres of the local authority for persons between twelve and seventeen. A court would have had power to require an offender to attend at such centre for not more than sixty hours in the aggregate, without interfering

with his school or working hours, for not more than three hours in any one day, and not after six months from the date of the order.

Howard Houses were to be set up by the Home Secretary for convicted persons between sixteen and twenty-one and a court given power to require them to reside in such a house, leaving there for employment on the usual terms recognised by good employers in the district. Residence in a Howard House could be required for six months and supervision thereafter for a further six months. Punishment would have followed failure to attend a centre or reside in a Howard House. Detention in police cells was only to be authorised till 8 p.m. or, in the case of persons over seventeen, for not more than three periods, each including one night's detention with four clear days between each period with all periods concluded within two months.

The Society advocates the setting up of probation hostels as well as Howard Houses. The provisions about compulsory attendance centres were amended while the Bill was in Committee in 1938 and the Society advocates that at least experimental centres should be set up if the full provision made in the 1938 Bill cannot be passed into law. The Bill proposed to permit magistrates to send persons between sixteen and twenty-three to Borstal, but fortunately this power was taken away in Committee stage in Parliament. The existing power to send depraved or unruly persons under sixteen to prison was to be abolished but left for children between sixteen and seventeen. Between seventeen and twenty-one a person could only be sent to prison after a court had obtained full information about him, and if it stated its reasons for the sentence, including a statement that no other method of dealing with him was appropriate. Eventually all imprisonment for persons under twenty-one would be abolished.

A scheme for corrective training for persons over twenty-one (twice convicted of an indictable offence for which a sentence of two years' imprisonment or more can be passed) was to be set up, and was to have been for not less than two years and not more than four years for persons between twenty-one and thirty who might be reformed by it. Service of these sentences was to take place in special prisons.

Preventive detention could under the Bill be ordered for

persons over thirty if necessary for the protection of the public. Such sentence of not less than two or more than four years might be given for an offence, as in the case of corrective training, with two previous convictions on indictment while offenders who had been convicted three times of certain serious offences might receive up to ten years' detention. The Haldane Society consider that adequate safeguards should be provided in such sentences, and that they should not be served in part of a prison.

The different types of imprisonment, such as hard labour and penal servitude, were to be abolished under the Bill; the practical difference is already negligible. Discharged persons after a sentence of twelve months or more who had been twice convicted of one of the serious offences mentioned in the Bill, were to be required to report to a prisoners' aid society appointed by the Prison Commissioners, and, on failure to do this, monthly to the police.

Under the Bill time spent in prison waiting for an appeal or trial was to count as part of the sentence.

The Bill proposed also that flogging should be abolished as a punishment to be inflicted by a court, but left it for breaches of prison or Borstal discipline. The Haldane Society urge that this abolition of corporal punishment should apply to all offences. It is interesting to remember that the Departmental Committee on Corporal Punishment, 1938 (Cmd. 6,584), came to the conclusion that it was of no advantage as a deterrent and had many drawbacks.

Another reform advocated by the Haldane Society is the inclusion in the Bill of the abolition of the death penalty. This was recommended by a House of Commons Select Committee in 1931. There is no good argument for maintaining the death penalty for any offence. Some of the British Dominions, such as New Zealand, have abolished it.[1] Countries similar to Great Britain, such as Denmark (1930), Holland (1870) and Norway (1905; last execution, 1875) have abolished it for over sixty years, and the murder rate has not

[1] New Zealand and Switzerland abolished it during the war. See "Capital Punishment," by Theodora Calvert, *National News Letter*, 1946, 1*s*., from the National Council for the Abolition of the Death Penalty, 34, Victoria St., S.W.1.

gone up, but, on the contrary, has continued to decrease. There is a possibility that innocent men may be hanged. The Scottish case of Oscar Slater who was condemned to death, reprieved, and after twenty years imprisonment and a new trial in 1927 established his innocence, shows that criminal courts are not infallible.

The use of flogging and the death penalty panders to the sadistic instinct in human beings; they have a bad effect on prison staffs and on the public who so avidly devour the reports of murder cases. The atmosphere of melodrama and sensation surrounding a murder trial would be considerably reduced if the penalty were only penal servitude for life. Moreover, it is for the State to set a good example, and without entering on the question of the sanctity of human life, it can scarcely encourage respect for life for the State to commit what many people regard as another murder as a reprisal for the first.

The final amendment desired by the Haldane Society is the introduction of a prisoners' friend to represent persons charged with offences against prison discipline. Such sentences may at present be given by the Governor of a prison or visiting magistrates and the prisoner is at present at a grave disadvantage.

Juries

Juries are of importance in criminal cases and in some cases of civil character, such as libel and breach of promise.

Persons qualifying for service as common jurors include residents possessed of £10 a year in freehold property or £20 a year leasehold property for not less than twenty-one years or householders residing in property having an annual value of not less than £30 a year in Middlesex or London or £20 a year elsewhere. There is also a qualification which consists of owning a house with more than fifteen windows! Special juries, now to be abolished, are persons of higher degree than esquire or who are legally entitled to be called esquire, bankers or merchants or occupiers of private houses of an annual value of £100 in towns of 20,000 people or more, or more than £50 elsewhere, occupiers of farms of an annual value of not less

than £300 or occupiers of other premises with an annual value of not less than £100.

The Haldane Society consider that there is no case for maintaining special jurors who are supposed to give one side or the other, an advantage because they are composed only of persons of an allegedly superior social class. It further considers that all property qualifications should be abolished, and, subject to the necessary exemptions, such as pregnant women, all persons on the Parliamentary voter lists should be liable for service. The list of exceptions should be revised; why should officers of the Forces but not privates be exempt? There seems to be no good reason for the exemption of ministers of religion either.

The present payment for a common juror in London is 1*s.*, 8*d.* in the country and 2*d.* in the City of London Court. A jury case may last for several days, or in exceptional cases several weeks, and if the burden is to be spread more widely over the whole population, jurors should not be penalised, but should be paid £1 per day, and travelling expenses.

Simplification of Divorce Procedure

The Haldane Society is convinced that divorce cases can only be dealt with really cheaply and quickly when they are heard in county courts. This is a fundamental reform in this connection which we advocate, but pending its reform a great deal can be done to simplify procedure as it is at present. The proposals for simplifying and cheapening divorce procedure recommended by the second and third Reports of the Denning Committee,[1] would reduce the cost of a divorce case by £10 to £20 according to the type of case.[2] All procedural reforms can be enacted without an Act of Parliament, but some of the recommendations of the Denning Committee's third Report require a Statute. These include the abolition of the absurd

[1] Cmd. 6,945 (1946), 7,024 (1947).

[1] According to the Attorney-General in Parliament (May, 7th, 1947), the new Matrimonial Causes Rules reduce the costs by some £8 only. But there are eighteen procedural changes proposed in these reports which have not been effected and the Society continues to press for this to be done.

rule of law which prevents a man from giving evidence of non-intercourse with his wife if the result would be to make a child of hers, of which the husband is not the father, illegitimate in law although such evidence can be given by someone else. For instance, an officer in the Royal Army Pay Corps can be called to prove that at the time of conception the husband was abroad. The Committee also recommend that a husband and wife should be compellable witnesses of their own adultery. This rule would simplify evidence in many cases. Finally, the Committee refers to the cases of people who have drifted apart or separated by consent, or cases where one spouse refuses a divorce on religious grounds or feelings of vengeance—the Committee recommends that after seven years' separation consideration should be given to the principle of allowing either party to apply for divorce. The principle of this proposal is sound, but seven years' separation is a ridiculously long period out of a person's life. We should also mention that we have no objection to the reconciliation proposals of the Denning Committee, except the proposal to subsidise religious and denominational bodies who give advice on marriage. There is a strong case for the setting up of Marriage Bureaux, not only for reconciliation procedure, but to give advice on any aspect of sex, physical or psychological; such bureaux need not be run directly by local authorities, but could be under their auspices, as many Citizens' Advice Bureaux are.

Magistrates

The Haldane Society has welcomed the appointment of the Royal Commission on Magistrates, and has published its proposals for improvement in a pamphlet (Gollancz, 1946, 6*d.*). Here we will only say that our main proposals are:

(*a*) That mayors and other members of local authorities should cease to become J.Ps. automatically—they may be quite unfit for this purpose.

(*b*) That the advisory committees which advise the Lord Chancellor on the appointment of magistrates should cease to be composed mainly of representatives of political parties, but should contain persons drawn from wider fields in the locality, viz. religious, political, industrial and social work.

(*c*) That politics should not enter at all in the appointment of magistrates, but the field of selection should be widened so as to draw on many sections of the community which have hitherto been rather ignored—for instance, there may be teachers or social workers or ordinary housewives who would make good magistrates, but who, unless they are well-known politically, are generally ignored at present.

(*d*) We attach great value to magistrates continuing to be laymen and not lawyers; with a clerk who is a lawyer, this system works quite well and would work better if magistrates' clerks were all made wholetime, as recommended by the Government Committee[1] on Clerks to Justices. The administration of law is kept more human if infused with a strong lay element.

(*e*) Advice on points of law should be given by the clerk publicly in open court.

(*f*) That a retiring age should be fixed.

(*g*) That magistrates should be paid their out-of-pocket expenses and loss of earnings of not more than £1 per day due to the performance of their duties. Many potential good magistrates cannot at present be appointed because they cannot afford the financial loss the work would cause them.

The Society also attaches importance to more care in the selection of magistrates. Personality and intelligence tests might well be used in their selection, and it is suggested that they might be appointed on probation for a period, during which they would be expected to acquire some knowledge of the law and practice of the courts, and by visits to prisons and other institutions get some acquaintance with the results of their actions. Some knowledge of present-day psychology is also very desirable in order to understand offenders' motives, and determine the proper punishment for them.

Registration of Land

For one hundred years reformers have been trying to make the transfer of land as simple as the transfer of stocks and shares. They cannot do this because land is a very different

[1] Issued in 1944, Cmd. 6,507.

kind of property and subject to many rights and restrictions, but in London, Middlesex, Eastbourne and Hastings there is a State Register of land, and whenever non-registered property is sold it must be put on to the Register. The transfer of this registered property is simpler than the transfer of unregistered land. It is a little cheaper and is much safer, for, if anything is wrong with the title to the property—for instance, if someone buys property from a person who has no right to sell it—then compensation is payable out of State funds. Moreover, in these days of extending State control of laud, it is most desirable that there should be one register of land and its owners from which the State can obtain any particulars it requires.

The extension of land registration has been recommeuded by several Government committees, but, pending a new Act of Parliament, Labour councillors of county councils and county borough councils should note that under the Land Registration Act, 1925 (Section 121), the council can, at a meeting of which two-thirds of the council are present, request the Lord Chancellor to make registration of land compulsory within their area. It is desirable that this power should be more widely known and used.

Complexity of Statute Law

All law is in writing; the difficulty is to find it. English Law, unlike Continental Law, is contained partly in Acts of Parliament, partly in statutory rules and orders made by Government departments, and partly in decisions of the law courts which constitute what is generally known as "Common Law." The first problem is the multiplicity of Acts of Parliament dealing with any one subject. The following list is an example:

The Marriage Contracts and Consanguinity Act, 1540.
The Marriages Pre-contract Act, 1548.
The Marriages Confirmation Act, 1804.
The Marriages Confirmation Act, 1808.
The Marriage Act, 1823.
The Marriage Act, 1824.
The Marriages Confirmation Act, 1825.

The Marriage Confirmation Act, 1830.
The Marriage Act, 1835.
The Marriage Act, 1836.
The Marriage Act, 1840.
The Marriage (Society of Friends) Act, 1860.
The Marriage Confirmation Act, 1860.
The Marriage (Society of Friends) Act, 1872.
The Marriages Validity Act, 1886.
The Marriage Act, 1886.
The Foreign Marriage Act, 1892.
The Marriage Act, 1898.
The Marriages Validity Act, 1899.
The Provisional Order (Marriages) Act, 1905.
The Marriage with Foreigners Act, 1906.
The Deceased Wife's Sister's Marriage Act, 1907.
The Naval Marriages Act, 1908.
The Marriages in Japan (Validity) Act, 1912.
The Marriage of British Subjects (Facilities) Act, 1915.
The Marriage of British Subjects (Facilities) Amendment Act, 1916.
The Deceased Brother's Widow's Marriage Act, 1921.
The Marriages Validity (Provisional Orders) Act, 1924.
The Age of Marriage Act, 1929.
The Marriage Measure, 1930.
The Marriage (Prohibited Degrees of Relationship) Act, 1931.
The Marriage (Naval, Military and Air Force Chapels) Act, 1932.
The Marriage (Extension of Hours) Act, 1934.
The Banns of Marriage Measure, 1934.
The Marriage Act, 1939.
The Marriages Validity Act, 1939.
The Marriage (Members of His Majesty's Forces) Act, 1941.
The Foreign Marriage Act, 1947.

Thus we have thirty-eight Acts of Parliament dealing only with the law of getting married. This excludes all the acts about the effects of marriage and about divorce. Other branches of

law are as bad. To ascertain the law about death duties, one sometimes has to go back to the Legacy Duty Act of 1796.

The income tax Acts were consolidated in 1918, but, having been amended every year since, are now in nearly the same mess, while a draft Bill to codify the income tax law, prepared in 1936 by the members of an expert committee which had worked for ten years, has been carefully shelved and remains only a useful text-book for taxation experts.

The law of magistrates in the Statutes starts with a Statute of 1326 in Norman French, followed by Statutes of 1344, 1360, 1388, 1390, 1403, 1414—altogether under this heading the volume shows seventy-one Acts to 1929, and there have been a number since. No one benefits from this chaos. The law is difficult to find and often its meaning is obscure when found. Lawyers are unable to give satisfaction to their clients; officials do not know what they are administering. Even when Parliament consolidates the law, as with the Town and Country Planning Bill, 1947, for some curious reason it sometimes leaves part of an earlier Act outstanding (in this case, part of an Act of 1944) and the consolidation is not complete. One simple reform would be to enact that, when an Act is amended, it should be reprinted with the amendments embodied in it. This has been done with the Army Acts since 1881, but consolidation of the whole of Statute law should be undertaken. For this to be done effectively it will probably be necessary for a small commission of experts to be set up who will first consolidate Acts of Parliament and then turn to codification. This can be done if they have sufficient paid staff.

Every Government department is believed to have prepared consolidation Bills for which there is no time, no interest among M.Ps., and no votes to be sought among the electorate.

The procedure for getting consolidation and codification Bills through Parliament may therefore need modification. They are apt to get jammed in the mass of contentious legislation and, because thought to be of interest to only a few, they easily fail to get through. Measures of the Church Assembly which amend Statute law become law by the simple resolution of both Houses of Parliament, and consideration might be given to adopting a similar procedure for these types of Bills after examination by a joint Committee of both Houses.

Codification

Codification is a more formidable task, because this means bringing into code, not only Acts of Parliament, but judges' decisions. According to Claud Mullins' *In Quest of Justice*, in 1794,[1] a judge said that "when a student he could carry a complete library of books in a wheelbarrow, but that they were so wonderfully increased in a few years, they could not then be drawn in a wagon." At that time there were some 150 volumes of reports compared with early Stuart days of fifty to sixty volumes. In 1867 there were 1,300 volumes with 100,000 reported cases, and in 1895, 1,825 volumes, and the increase has since continued. *The English and Empire Digest* of forty-four volumes summarises about 245,000 cases, and this number excludes those referred to in the annual supplement to it. The output continues every year. Law reports provided by the Council of Law Reporting, *Law Journal*, *Times Law*, *All England Reports* and others swell the volume day by day.

"The position is quite otherwise in countries in which the citizens live under a codified law.

"The educated Frenchman, for example, whether in a matter of business, professional, or family life, has a better knowledge of the law applicable thereto, and of the legal bearings of a point in controversy, and of legal principles in general, than has an Englishman of similar position. The former is accustomed to being referred to particular paragraphs of his code. This code is an intelligible reality to him and he would not dream of parting with it for a system of unwritten judiciary law. And, equally important in this connection, is the fact that he does not regard litigation as an evil to be dreaded, but as the normal and satisfactory method—economical and easily available—of ascertaining his legal position in case it should be the subject of serious controversy.

"In other words, in countries where moderately good codes exist, the legal system functions to the general satisfaction of the citizens. It does not so function in England, nor can it possibly do so until codification has been effected."[2]

[1] P. 107.

[2] Heber Hart, K.C., *The Way to Justice*.

It is not surprising, therefore, as Claud Mullins says, that other countries have not adopted English law.

The first movement for codification was made by Jeremy Bentham at the beginning of the nineteenth century, although he had been partly forestalled by James I.

Bills for codifying the Criminal Law were introduced here in 1845 and 1852. The Lord Chancellor, Lord Westbury, stated that he intended to codify the law in 1863; a further attempt was made in 1878 and all failed. The Haldane Society urge that the Commission before referred to should take up this work again and codify each branch of the law in turn. The law on bills of exchange was codified in 1881, sale of goods in 1896, partnership in 1890, marine insurance in 1906. These partial codes have worked exceedingly well, and contain the essence of all the law on the subjects with which they deal.

The only plausible argument against codification is that judge-made law is more flexible and codified law becomes static. The flexibility of common law takes a long time to become apparent and is very expensive for the individual litigants who make the law. It is the task of Parliament and not judges to change the law, and if the law changes too slowly, or not at all, this is the fault of Parliament and should be dealt with by reforming Parliamentary procedure and not by maintaining a system of law which so frequently makes it quite impossible for a lawyer to advise with any certainty what the law really is.

The Napoleonic code succeeded in France; the Indian Penal code in India. One of the first things a nation does when it becomes free is to adopt its own code of law. After the Turkish Revolution in 1921, Turkey adopted a new code, but not English law, because no one can say definitely what much of English law is. The preparation of a code, moreover, will not only summarise existing law, but the opportunity can be taken to get rid of many of the anomalies and irritating rules which judges have established, and which tend to linger on for many years because no department is responsible for surveying and improving the law as a whole. The survival of Roman law is due to it having been systematically consolidated. In America, which mostly follows English common law, the forty odd states which are continually producing their own laws and

decisions, present a problem from which, fortunately, we do not suffer. But the American Bar Association has drafted model codes on different branches of law which it is persuading states to pass into law with the hope of uniformity and clarity over the whole of the U.S.A.

There has been an unofficial codification, that contained in Halsbury's *Laws of England*, which would be of great service to framers of a code. But a code not only needs a statement of the existing law; it requires an enactment that no case decided before the code shall have any binding authority.

The failures of previous codification attempts do not make us pessimistic. We believe that with this new Government something can be done. If citizens will only realise that law is not something like disease, to be avoided, but that it enters into every transaction they undertake, they can demand that in their own interests it should be clear and accessible.

The Management of the Courts and Their Practice and Procedure

Before 1875 there was a comprehensive enquiry into the system of the courts and a complete overhaul of their practice. Since then there have been sporadic enquiries and piecemeal reforms. Yet there is widespread discontent with the delay of cases, high cost of litigation, too much centralisation in London, length of courts' holidays, the way in which times of hearing are arranged so that parties, witnesses and lawyers never know when the case is to be heard, the way lawyers are paid and the rules of procedure which mean that a publication containing 3,041 pages and referring to 12,400 reported cases has to be consulted in order to know how to conduct an action.

While the Haldane Society can put forward a number of proposals on these problems, we consider it better that there should be another Royal Commission of experts who are prepared to spend, if necessary, their whole time for a number of months or years on investigating the administration of justice. They should have the following terms of reference:

"To enquire into the administration of justice in England and Wales in relation to civil proceedings with a view to the simplification of their procedure, the reduction of costs and their speedier and more convenient trial and to report what

reforms are desirable; and in particular to report whether a Ministry of Justice should be constituted; whether branches of the High Court of Justice should sit permanently in regional towns in England and Wales, and if so the relationship of the decentralised High Court with county courts; whether county court judges should be given the status of commissioners of the High Court for all purposes; whether a new and simplified code of procedure similar for all proceedings in all civil courts should be issued, and if so to suggest the principles on which it should be based; whether barristers and solicitors should be amalgamated into one profession, and if so how such fusion should be brought about; whether the present methods of appointment of judges, officers, clerks and officials of the courts and of determining their remuneration are satisfactory or if they should be appointed by one minister alone, and what other changes in relation thereto are desirable; whether all courts should sit continuously, judges and officials taking their holidays in rotation or if the principle of vacations should be maintained; whether any and what changes should be made in the present methods of remuneration of barristers and their clerks and solicitors; whether one appellate tribunal only should hear appeals from courts of first instance and if so how it should be constituted; whether any and what changes in the law of evidence should be made with a view to the simplification thereof or whether the law of evidence should be abolished, a court being left free to attach such weight to evidence as is desirable in the particular case; whether the law officers of the Crown should have the right to refer any doubtful point of law to the High Court for an advisory opinion at the public expense; and whether any and what other reforms in relation to the foregoing matters are desirable."

The Commission will be expected to deal with each of these problems in detail. Royal commissions are not, as is commonly supposed, a delaying device. They are fact-finding bodies whose reports may have a very considerable educational effect, and if their members are carefully chosen and if they conduct their enquiries rightly, their proposals may have a very considerable influence on legislation.[1] If appointed now, this

[1] See *Royal Commissions of Inquiry*, by H. D. Clokie and J. W. Robinson. Standord University Press, 1937.

commission would produce its report in time to be carried out during the next Government's period of office.[1]

Legal Aid

The State provides courts for the settlement of disputes, but does little to ensure that those who need to use them can do so. There is no official scheme of assistance at all in the county court, in which all small claims are brought, and which nowadays deals with matters of considerable importance—for instance, matters arising under the Rent Restriction Acts. There is not even any provision for county court fees to be remitted in poor persons' cases, as there is in the High Court. A Committee of 1928 objected to this reform because such remission might encourage litigation! There is also no provision for legal assistance in civil proceedings before magistrates. In the High Court there is a scheme for providing assistance by way of charity. The free services of barristers and solicitors are available to those earning not more than £4 per week and possessed of not more than £100 capital. No one with an income or property above these limits, whatever the size of his family or his circumstances, is entitled to any aid at all. All applicants have to obtain a certificate from a committee who are free to reject a case without giving any reasons, and there is no appeal if a certificate is refused.

In the criminal courts the Poor Persons' Defence Act, 1930, does provide for the granting of certificates for legal aid at the discretion of magistrates or a judge, and this certificate entitles the lawyer conducting the case to a rather low fee. The number of certificates granted, however, is so low in comparison with the number of cases tried (327 by magistrates in 1938 out of 19,079 cases where people were sent to prison without the option of a fine) that one can only conclude that courts either do not know of the Act or do not approve of it, and that few defendants know of their right to apply for legal aid.

None of these provisions for assistance in the courts provides

[1] Since the above was written the Lord Chancellor has appointed two committees—one to enquire into High Court practice and administration and a similar one for the county court. Their terms of reference are, however, narrower than proposed above and they are not composed of whole-time members.

for advice, yet often the two cannot be separated. Advice is left wholly to charity, and its quality varies considerably. Frequently it is given by a solicitor or barrister attending a settlement or church once a week in the evening with inadequate reference books and no facilities for taking notes or writing letters. There were many large towns, such as Cardiff and Coventry before the war, with no provision for free legal advice at all, and there were then only seventy poor men's lawyers' premises in the provinces and fifty-five in London. After the war began the nation-wide organisation of citizens' advice bureaux led to rather better advice facilities, while the State found it necessary to set up legal aid sections in the Forces for advice, and, through the Law Society, to establish a Divorce Department which now undertakes civilian as well as Service poor persons' divorces.

The courts are therefore open to everyone, like the Ritz Hotel (or London Tavern, as it was said in former centuries). Most countries where the position is as bad as England are found in the British Commonwealth. Sweden and Russia are a great contrast.

The report of the Rushcliffe Committee on Legal Aid and Legal Advice[1] was therefore an outstanding event in the movement for providing proper legal aid for poor persons and persons of moderate means. The demand for this reform appears somewhat unexpectedly to have originated with lawyers. The movement grew rapidly after the publication of an article in the *Law Quarterly Review* by Dr. E. J. Cohn, and, after considerable agitation by the Haldane Society and other bodies, the Rushcliffe Committee was appointed in May, 1944. It received evidence from many sources, including political parties and organisations of social workers. The keynote of much of the evidence was that citizens should be entitled to legal advice and legal aid in courts as of right and not by way of charity. The Committee accept this principle and say that in criminal cases legal aid should be granted in all instances where desirable in the interests of justice. Their proposals are surprisingly radical. In civil cases legal assistance should be available in all courts, including administrative tribunals, but certain income and capital tests are proposed.

[1] Cmd. 6,641.

Lawyers are no longer to be asked to do work for poor persons free. Costs of assisted persons are to be paid on a limited scale by the State, which will be reimbursed to some extent by costs recovered by assisted litigants who are successful. An assisted person is to be required to contribute part of his income and capital towards the costs.

The Committee reject the idea of administration by the State or local authorities, since they are often interested parties in a case in which help is sought. The scheme is to be organised by the Law Society, working through area and local committees. Certificates are to be granted by the local committee, with an appeal to the area committee. These committees will also be responsible for arranging for legal advice to be given for a fee of 2*s.* 6*d.* Each area committee is to have an office open for advice, branch offices where necessary, and whole-time paid solicitors to give advice. The assessment of means is to be done by the Assistance Board with no appeal against its decision.

The Report is, however, capable of improvement in the following respects:

1. The report proposes to substitute the words "assisted person" for "poor person." We should prefer "qualified person."

2. Paragraph 156 (3) fixes the upper income limit for assistance at £420. No reason is given in the report for the selection of this arbitrary figure of £420. People earning more than this sum may well be involved in actions which they cannot maintain, owing to lack of resources. A man earning (say) £500 a year may have a dispute with an insurance company in which an appeal lies to the House of Lords. The security for £700 for such an appeal which has to be provided by an appellant would probably make it out of the question for him to risk the costs even of an appeal beyond the court which first heard the case. Another case in which a rigid income limit might work hardship is that of an inventor with limited means who has a dispute about a patent with an industrial combine. The keynote of any scheme for legal aid should be the utmost flexibility. Each case should be judged on its merits without any income limit.

3. Paragraph 156 (4) fixes the amount of contribution to be

paid by assisted persons from income at half the difference between £156 and the adjusted income for one year in respect of single persons and at half the difference between £208 and the adjusted income for one year in respect of married persons. These proportions are too rigid and the amount of the contribution from income should be left to the Assistance Board in consultation with the Area Committee.

4. The proposals to disregard household effects, tools of trade, the applicant's house, and, in certain circumstances, capital employed in his business are excellent, but are very badly marred by the rigidity of the recommendation that all capital over £25 in the case of a single person and all capital above £50 in the case of a married person, should be available towards the costs of proceedings. It would be better if no line were to be drawn above which all capital is taken, but if a limit is to be fixed the amounts should not be lower than £100 and £200 respectively.

5. Paragraph 171 recommends that the administration of the scheme should be in the hands of the Law Society. The proposals made by the Haldane Society to the Committee are an interesting contrast. We took the view that the scheme should not be administered solely by the legal profession, and proposed that the controlling committees should contain representatives of the Lord Chancellor's Department and national social agencies, that, in the case of local committees bodies such as the local authority, the Council of Social Service and the trades council should be represented, while the provision of legal advice should be organically liuked with citizens' advice bureaux.

The association of laymen with the administration of the scheme might prevent the complacency and conservatism which so often arise with purely professional bodies. Some of the present poor persons' committees take it upon themselves to refuse relief where the court would grant it. "The parties have obviously regarded the marriage so lightly that it has felt reluctant to put the court and the conducting solicitor to so much trouble in bringing about its dissolution." It is unfortunate that since the Ministry of Health circular (197/45) on local information services financial support has been withheld from some citizens' advice bureaux and some have had to cease

functioning. Local authorities' information bureaux, however good, will not always appear to the public to give unbiased advice and, since legal advice is sometimes required on the actions of State and public authorities, it should be given by an agency which is, and appears to be, independent.

6. The report does not mention the Haldane Society's suggestion that a properly qualified social worker should be attached to every area committee and local committee where necessary. Solicitors have been described as "social workers for the rich," but they are not properly trained in social work, their treatment of a case may be psychologically lacking and their knowledge of available help may be inadequate. Poor men's lawyers have proved the usefulness of a social worker who can assist with reconciliation and investigation.

7. The Report proposes that preliminary enquiries in divorce should not be included in the costs to be covered by a legal aid certificate. Often the most difficult enquiries have to be made in cases of people with limited means, and lack of money to pay enquiry agents sometimes prevents a divorce from being begun. The difficulty of tracing parties in civil cases is often very great or even insurmountable, and we suggest for consideration that the police force should be used for the purpose of tracing missing witnesses or parties. We doubt if it would be desirable to use the police for collecting evidence for a party in a case.

Finally, the Rushcliffe Committee propose the setting up of a central committee to advise the Lord Chancellor, and it is to be hoped that from this advisory committee will come proposals for law reform which will reach the Statute Book. The Law Society is now working out the details of a scheme based on this report and it is believed the Government will soon pass the necessary legislation.

Conclusion

We therefore submit this eleven-point programme of law reform to lawyers, to members of the Labour Party and to all citizens. Law pervades and enters into every department of life; from birth to death, all transactions of a citizen are governed and regulated by law. His happiness and well-being may depend to a large extent on his ability to ascertain what

the law is and, if need be, to enforce his rights or compel someone else to perform their duties by action in courts of law or by process before one of the administrative tribunals which are now becoming so common; with law and its administration as they are at present, the citizen frequently cannot do this. Englishmen and lawyers are proud of English law for the traditions of freedom and liberty it enshrines.

Our programme is designed to make English law something which is acceptable to all and which will, for the first time, become a model for other nations to adopt. Those who agree with us are urged to support us actively by writing to their Member of Parliament, House of Commons, S.W.1, moving resolutions in favour of our programme of law reform at societies and trade unions, political parties and other bodies to which they belong, and by asking us to supply speakers and information to such bodies. Law will be reformed if the public demand is vocal enough.

The Haldane Society is the organisation of Socialist lawyers, and is affiliated to the Labour Party. Membership is open to barristers, solicitors, bar students, articled clerks, managing clerks, teachers of law, and certain other persons concerned with the law. Associate membership is open to anyone who, whether connected with the law or not, is in general sympathy with the objects of the society.

Full particulars may be obtained from Mr. Stephen Murray, 7 King's Bench Walk, Temple, London, E.C.4.